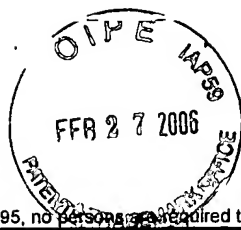


Doc Code: AP.PRE.REQ



PTO/SB/33 (07-05)
Approved for use through xx/xx/200x. OMB 0651-00xx
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE
Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number.

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

EST-10202/15

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]

on _____

Signature _____

Typed or printed
name _____

Application Number

10/618,971

Filed

July 14, 2003

First Named Inventor

Richard J. Dibbs

Art Unit

3742

Examiner

Quang T. Van

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.

I am the

☐

applicant/inventor.

☐

assignee of record of the entire interest.

See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

☒

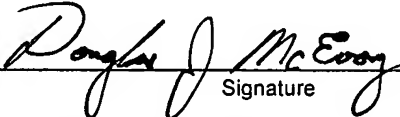
attorney or agent of record.

Registration number 34,385

☐

attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 _____


Signature

Douglas J. McEvoy

Typed or printed name

(248) 647-6000

Telephone number

February 27, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☒

*Total of 3 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Richard J. Dibbs

Serial No.: 10/618,971

Group Art Unit: 3742

Filing Date: July 14, 2003

Examiner: Quang T. Van

For: EGG HANDLING PASTEURIZATION APPARATUS AND METHOD

PRE-APPEAL BRIEF REQUEST FOR REVIEW
STATEMENT OF ARGUMENTS

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant requests review of the above-referenced application on the basis of the following remarks.

Claims 50-56, 86-97 and 100-109 remain pending in the application and are rejected under a variety of prior art references to be addressed below. Accordingly, claims 50-56, 86-97 and 100-109 are submitted for review.

Claims 50, 52-54, and 87 under
35 U.S.C. §102(b) over Hwang (U.S. Patent No. 5,078,120)

The rejection in relevant part states that Hwang discloses a cooking oven for slow cooking of food products comprising a spiral oven and which is configured to increase a temperature to a first predetermined temperature for a predetermined time level.

Hwang teaches a cooking oven of a generally spiralized configuration for the mass cooking of food products, such as chicken/poultry parts, hamburger/fish patties, vegetable foods and *other products* (see column 2, lines 43 et seq.), and which in particular utilizes steam and/or heated air to achieve varied cooking characteristics in the cooking process.

The in-shell egg pasteurization system of claim 50 differs in two fundamental respects from what is shown and described in Hwang. First, and notwithstanding the general reference to varied food items, Hwang nowhere teaches or suggests pasteurizing in-shell eggs.

Second, the act cooking as disclosed in Hwang is not pasteurizing as recited in the present invention. Specifically, and referencing the appended definitions of cooking and

pasteurizing as set forth in dictionary.com, cooking is properly defined as “undergoing the application of heat especially for the purpose of later ingestion.”

In contrast, pasteurizing is defined heating food in order to kill harmful microorganisms. Specifically, the act of pasteurizing lacks the protein denaturization of “cooking”. The application of energy to kill harmful organisms within an egg and leaving the egg otherwise unchanged is the basis of the pending invention.

Respectfully, the Examiner is submitted as not having met his burden in establishing the anticipation of the claims, in particular claim 50, in the citation of Hwang.

**Claims 56, 89-91, 94, 102, 105-106 under
35 U.S.C. §102(b) over Polster (U.S. Patent No. 6,113,961)**

The rejection states that Polster teaches a grader configured to grade an in-shell egg, an oven configured to increase a temperature of an in-shell egg to a first predetermined temperature and a packer to pack the egg. On page 4, paragraph 3, the Examiner further opined that Polster’s disclosure includes a cavity “capable” of increasing a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval, thus meeting the claimed limitation.

In pointed response, claim 56 recites a **non**-batch egg pasteurization system employing a pasteurizing cavity prior to a packer. Polster nowhere teaches or suggests non-batch pasteurization in any fashion. To the contrary, the incorporation of individual flats (i.e., plural egg-holding trays) militates against the possibility of any type of non-batch process, which Applicant understands to be the “successive” treatment of in-shell eggs in a progressing fashion.

Furthermore, the Examiner references column 2, lines 26-33 as teaching the ability to pre-grade and separate the eggs in some fashion, prior to batch pasteurizing. Claim 56, as presently amended, does not recite grading.

Rather, claim 56 recites the step of packing the in-shell egg following in-cavity pasteurization. Nowhere does Polster disclose packing in any application to the batch process grading. Rather, Polster merely states that, following batch process heating, an unloader removes the eggs from the heating zone. Accordingly, the feature of an egg packer positioned downstream from a non-batch egg pasteurization cavity is not disclosed in Polster.

**Claims 51, 55 and 101 under 35 U.S.C. §103(a)
over Hwang in View of Ball et al. (U.S. Patent No. 6,455,094)**

The features of dependent claims 51, 55 and 101 all depend from claim 50 discussed previously. These claims, respectively, recite a cooler located downstream from the spiral pasteurization oven for reducing the temperature of the in-shell egg to between 45°F and 75°F

(claim 51), cooling the egg between 1-20 minutes (claim 55) and initial pasteurization heating in a range of 120°F to 140°F (claim 101).

Ball was combined with Hwang, according to the Examiner, to teach the provision of a cooler arranged downstream of an oven (directed to cooking rather than pasteurizing as has been established). The Examiner in particular references a graphical representation (see Fig. 25B, column 7, lines 14-18) and column 8, lines 58-65 which generally states that eggs can be cooled by exposing to temperatures below those required for pasteurization.

Reviewing Ball, it is a reference purely scientific in nature and does not teach or suggest a cooler arranged downstream (as specifically recited in claim 51) from a pasteurizing oven. The mere reference that it may be desirable to cool an egg following pasteurization, as admittedly suggested by Ball, does not substantiate the incorporation of a cooler element into a line process for the purpose of establishing such cooling in a progressing egg pasteurization system.

**Claim 86 under 35 U.S.C. §103(a) over Hwang
in View of Plemons (U.S. Patent No. 4,079,666)**

Claim 86 recites a spiral cooler located downstream a pasteurizing oven and configured to reduce an in-shell egg to a second temperature of between 45°F to 75°F. Plemons was cited in combination with Hwang as teaching a spiral cooler arranged downstream of an oven.

In fact, Plemons teaches a conveyor fed and spiraled cooling chamber for reducing moisture content of pizza crusts, including surface treating with ethyl alcohol. Plemons, just as Hwang, has nothing to do with either pasteurizing or in-shell eggs.

In rejecting claims under 35 U.S.C. §103, the Examiner bears the initial burden of presenting a prima facie case of obviousness. See *In re Rijckaert*, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the art having the references before him to make the proposed combination or modification. See *In re Litner*, 173 USPQ 560, 562 (CCPA 1972).

The conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention, see again *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d, 1596, 1598 (Fed. Cir. 1988).

Rejections based on §103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The Examiner may not,

because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. Rather, and when satisfying the burden of showing obviousness of the combination, the Examiner can show some objective teaching in the prior art or knowledge generally available to one of ordinary skill in the art which would lead that individual to combine the relevant teachings of the references. *In re Lee*, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002), citing *In re Fritch*, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). Broad conclusory statement regarding the teaching of multiple references, standing alone, are not “evidence”; *In re Dembiczak*, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). Mere denials and conclusory statements, however, are not sufficient to establish a genuine issue of material fact. *Dembiczak*, 50 USPQ2d at 1617, citing *McElmurry v. Arkansas Power & Light Co.*, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993).

Applying the above analysis, it is submitted that the citation of an alcohol based pizza crust cooling mechanism (Plemons) combined with a poultry cooking oven (Hwang) does not render obvious the in-shell egg pasteurization system (claim 50) further reciting a downstream located spiral cooler (claim 86) for progressively cooling the in-shell eggs.

Claims 88, 92 and 97 under 35 U.S.C. §103(a) over Polster in View of Ball

Having previously examined both Polster and Ball, the rejection states that the Polster discloses all of the features of the claimed invention with the exception of the cooler arranged downstream of the oven, and that Ball further discloses a cooler (70) arranged downstream of the oven and configured to reduce the temperature of the eggs.

In response, there is no item 70 in Ball (it is suspected that the reference to Plemons was intended). Furthermore, the general technical description of cooling eggs as taught in Ball does not support the holding of obviousness based upon Ball providing a downstream located cooler.

Claim 93 under 35 U.S.C. §103(a) over Polster in View of Plemons

The rejection states that it would have been obvious to incorporate a spiral cooler (e.g. the pizza crust cooler of Plemons previously described) into an egg pasteurizing (batch oven process as in Polster) to render obvious the spiral cooler arrangement of claim 93 dependent from claim 56. Applicant again argues a lack of support in maintaining this rejection, again noting the deficiencies in the individual references discussed above.

**Claims 95, 100, 103 and 107-109 under
35 U.S.C. §103(a) over Polster in View of Hwang**

This is essentially a “mix and match” or “grab bag” rejection, wherein the Examiner is combining the batch pasteurization of Polster with the poultry product cooking oven in Hwang

and merely stating the obviousness of modifying Polster to permit pasteurizing a plurality of objects at the same time while passing (them) through the oven.

Of note, the method of claim 100 or the system of claims 107-109 do not even recite the feature of a spiral oven relied upon in the rejection. Rather, these claims recite a continuously conveying system for grading, pasteurizing and packing in-shell eggs.

Systematic throughout the Examiner's rejections is the failure to carefully address each claim being rejected, or to adequately identify the proper reference being relied upon to sustain the rejection. Accordingly, and in response, Applicant merely realleges the Examiner's failure to support the rejection of the claim s as being obvious.

**Claims 96 under 35 U.S.C. §103(a) over Polster
in View of Scharfman (U.S. Patent No. 3,830,945)**

The rejection cites the microwave energy generator in Scharfman in combination with the batch pasteurization process of Polster. Neither reference teaches or suggests the microwave oven of claim 96 in cooperation with the non-batch system of claim 56 including the subsequent packer. Again, neither Polster or Scharfman teach a packer at any step of the system.

Claim 104 under 35 U.S.C. §103(a) over Hwang in View of Scharfman

The rejection combines the egg microwave cooker of Scharfman with the meat/poultry cooking oven of Hwang, and as supporting the application of a microwave oven (claim 104) into the spiral oven based egg pasteurization system of claim 50. Once more, it is not seen how the microwave precooking/sterilizing device of Scharfman suggests application to the spiral poultry cooker in Hwang.

Summary

Review of the outstanding bases of rejection is hereby requested.

Respectfully submitted,


Douglas J. McEoy, Reg. No. 34,385

Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
2701 Troy Center Drive, Suite 330
P.O. Box 7021
Troy, MI 48007-7021
(248) 647-6000

Attorney for Applicant

CERTIFICATE OF MAILING BY "EXPRESS MAIL"

"EXPRESS MAIL" MAILING LABEL NUMBER EV 7344 393954S

DATE OF DEPOSIT February 27, 2006

I hereby certify that this paper or fee (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service "Express Mail Post Office To Addressee" Service under 37 CFR 1.10 on the date indicated above and is addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Judith T. Lange
Judith T. Lange